

R E M A R K S

Claims 1-64 are pending.

Examiner's Request for Information

Applicants understand that a complete reply has previously been provided per 37 C.F.R. § 1.105.

Applicants also believe that the Examiner agrees. If not, clarification is respectfully requested as to why Applicants have not already provided a complete reply per 37 C.F.R. § 1.105.

Applicants acknowledge the statement that there was no need for the Examiner to determine the priority of any pending claim since each reference predates the earliest priority application.

Applicants also note that since the Examiner has not evaluated the disclosures of the prior applications to assess which disclosure supports which pending claims, no determination as to the priority date of any pending claim has been made.

Section 103(a) Rejections

Claims 1 - 64 stand rejected as obvious in light of the Examiner's personal experience during 1991 and 1992. Applicants respectfully traverse the Examiner's Section 102 and 103 rejections.

Affidavit not notarized

Applicants note that the Myhre affidavit (item w on form PTO-892) is not notarized, and thus fails to qualify as an affidavit in accordance with the applicable Rules of Practice in Patent Cases.

If the Examiner maintains reliance on the affidavit (which would be improper as described below), Applicants request that the Examiner either:

- submit the document in proper affidavit form per 37 C.F.R. § 1.66 (i.e. re-dated, resigned and notarized), or
- submit the document in proper declaration form per 37 C.F.R. § 1.68 (i.e. notarization not required).

Examiner did not conduct a search

Applicants note that the alleged experiences relate to the operations of the well-known nationwide retailer Radio Shack™, which has been a publicly traded company (NYSE: RSH) since 1970.

Accordingly, Applicants request that the Examiner conduct a prior art search to provide reliable documentary evidence of the allegations, and to provide specificity to the allegations. For example, Applicants request any documentation that indicates, during the time period in question that:

- that Sprint sold telephones through Radio Shack™
- any price lists of the "current price" of a cell phone "(e.g., \$250)"
- any "service agreement with Sprint™" which indicates discounted prices
- any "list of service plans offered by Sprint™ with their costs and the amount of discount each would bring"

- any "Sprint™ application form"

Applicants also request clarification why the affidavit was not provided earlier, since it purports to describe events from well before examination and moreover the pending claims were never amended during examination.

When issuing the first Office Action (paper no. 15) and second Office Action (paper no. 19):

- did the Examiner have any memory of the alleged personal experiences, or instead
- did the Examiner only recall the alleged personal experiences after the Appeal Brief was filed on February 14, 2003?

The Examiner's Affidavit is not Substantial Evidence

All findings of fact by the U.S. Patent and Trademark Office must be supported by substantial evidence within the record. In re Gartside, 203 F.3d 1305, 1315, 53 USPQ2d 1769, 1775 (Fed. Cir. 2000). The Supreme Court has described "substantial evidence" in the following manner:

"substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938);

See also, Dickinson v. Zurko, 527 U.S. 150, 162, 50 U.S.P.Q.2D 1930, 144 L. Ed. 2d 143, 119 S. Ct. 1816 (1999) ("Zurko III").

Similarly "review under this standard involves an examination of the record as a whole, taking into consideration evidence that both justifies and detracts from the agency's decision."

Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88, 95 L. Ed. 456, 71 S. Ct. 456 (1951); Zurko III, 527 U.S. at 162.

One's Experience Alone is not Substantial Evidence

"With respect to core factual findings in a determination of patentability, however, the Board cannot simply reach conclusions based on its own understanding or experience -- or on its assessment of what would be basic knowledge or common sense. Rather, the board must point to some concrete evidence in the record in support of these findings." In re Zurko, 258 F.3d 1379, 1386, 59 U.S.P.Q.2d 1693 (Fed. Cir. 2001) ("Zurko IV") (emphasis added).

This requirement applies even though "the Board clearly has expertise in the subject matter over which it exercises jurisdiction." Zurko IV, 258 F.3d at 1385 - 86. This expertise may provide sufficient support for conclusions as to peripheral issues, not the core factual findings. Zurko IV, 258 F.3d at 1386. Deficiencies in cited references "cannot be remedied by the Board's general conclusions about what is 'basic knowledge' or 'common sense' ". Zurko IV, 258 F.3d at 1385 - 86.

Thus, the Federal Circuit has held that not only is an agency member's "own understanding or experience" not the same as "concrete evidence in the record", the agency member's "own understanding or experience" is not substantial evidence. Only "concrete evidence in the record" is substantial evidence. The Court could not "accept the Board's unsupported assessment of the prior art." Zurko IV, 258 F.3d at 1386.

It is worth noting that, in Zurko IV, the Court reversed the Board's judgment for lack of substantial evidence support. Zurko IV, 258 F.3d at 1386. It was therefore not merely an instance where the Board failed to articulate and place matter on the record, warranting remand. See, e.g., In re Lee, 277 F.3d 1338, 1346, 61 USPQ2d 1430 (Fed. Cir. 2002), (in the "fine line between agency reasoning that is 'so crippled as to be unlawful' and action that is potentially lawful but insufficiently or inappropriately explained", "in the former circumstance, the court's practice is to vacate the agency's order, while in the latter the court frequently remands for further explanation ... while withholding judgment on the lawfulness of the agency's proposed action.")

In summary, an Examiner's or Board member's "own experience" standing alone, even if such experience is adequately explained, is not concrete evidence in the record, and is thus not substantial evidence.

Documentation or Attestation Does not Create Substantial Evidence from Insubstantial Evidence

Since an Examiner's or Board member's "own experience" is not substantial evidence, it would be illogical to convert such undocumented experiences to substantial evidence merely by allowing the assertion to be affirmed under oath. Board members are already bound in their duties to follow ethical canons that are at least as binding as an affirmation under oath. Therefore, an oath could not be considered a 'cure' for undocumented experiences.

In light of the recent Federal Circuit decisions in Zurko IV and In re Lee, an Examiner's Affidavit under 37 C.F.R. § 104(d)(2) cannot be considered substantial evidence of assertions which are not supported by concrete evidence in the record. Moreover, that rule never specified that such an affidavit was to be considered, standing alone, substantial evidence which may be used as a primary basis for rejection. Instead, the rule providing for affidavits of Examiners might be better analogized to Official Notice, which as described below, is properly used only to "supplement or clarify the teaching of a reference". In re Ahlert, 424 F.2d 1088 (C.C.P.A. 1969).

Questionable Memory

Further reasons for lack of substantial evidence relate to the particular fact of the Affidavit. The events asserted occurred no later than 1992, 11 years before the date the affidavit was created. The accuracy of the Examiner's memory must be questioned.

Hindsight Basis for Remembering

Further, the accuracy of the Examiner's memory must also be questioned because the Affidavit was only created during the time after the Appeal Brief, which was filed February 14, 2003, 11 years after the events asserted in the Affidavit. By that time, the Examiner had already:

- read the Applicants' disclosure,
- construed Applicants' claims,
- conducted a prior art search for similar subject matter,
- applied references in two Office Actions against the pending claims, and
- read Applicants' arguments in the Response and Appeal Brief regarding the patentability of all pending claims.

It is extremely likely that the already dim memories of the Examiner were influenced by reading and analyzing all of this information, and thus hindsight affected the Examiner's beliefs as to what actually transpired in the 1991 and 1992.

Affidavit Not Challengeable

Pursuant to 37 C.F.R. § 104(d)(2), the Affidavit must be "subject to contradiction or explanation by the affidavits of the applicant and other persons."

The need to allow contradiction or explanation presupposes that the assertions in such an affidavit are those which could in some way be countered or clarified by facts in another affidavit. It also presupposes that applicants would solicit such additional affidavits in response to receiving an affidavit of the examiner.

Clearly, this rule would cover situations involving, e.g., facts and truths which could be analyzed by an applicant subsequent to receiving the affidavit of the examiner, so that the applicant could then collect additional facts which "contradict or clarify" the examiner's affidavit. Such situations include assertions as to, e.g., the chemical properties of substances, mechanical characteristics of apparatus components, and electrical properties of circuits. Such situations involve facts which, if proven today, demonstrate that they were previously true as well. Thus they are subject to contradiction because a current investigation or explanation can demonstrate the veracity of the assertions, or lack thereof.

However, an assertion of a public use, especially one in which no additional parties are made available to the applicant and the alleged activity has ceased, is not contemplated by the rule. Patent applicants could not "challenge" a statement of a public use, especially one which was, of its face, not widespread or readily disseminated beyond an extremely small group, and one which does not name corroborating witnesses who are available.

The Affidavit refers to the Examiner and other unspecified "customers". Each of these parties is not available to the Applicants, and thus the Affidavit is not "subject to contradiction or explanation." The Examiner cannot be called upon by Applicant to testify or clarify his assertions under oath through the patent examination process. The remaining parties are unnamed, and there is no specificity as to who else might be able to contradict or deny the assertions in the Affidavit.

Accordingly, the Affidavit is not subject to contradiction, and thus contravenes the rule which provides for an affidavit of the Examiner.

Contravenes Public Use Procedures

The rules provide for public use proceedings when there is an allegation of public use or sale more than one year before the filing of the application. These rules provide procedural and substantive safeguards which are circumvented by allowing a patent examiner to allege public use via an affidavit alone during ex parte examination.

The Commissioner has the authority to declare a public use proceeding in which a patent application may be rejected as anticipated by a public use. 37 C.F.R. § 1.292. If such

proceedings are instituted, the patent applicant must be afforded the opportunity to cross examine witnesses whose testimony is used in alleging a prior public use of the invention. 37 C.F.R. § 1.292(a); 37 C.F.R. § 1.671 - 1.685. Evidence must comply with the Federal Rules of Evidence. 37 C.F.R. § 1.671(b). Parties are allowed to, e.g., seek permission to compel testimony or the production of documents of things under 35 U.S.C. § 24 or from an opposing party. 37 C.F.R. § 1.671(g) - (h). Witnesses may be examined. 37 C.F.R. § 1.673 - 1.675.

Thus, these rules clarify the substantive and procedural burdens that must be met in invalidating an application based on evidence of public use or sale more than one year before the filing of the application.

None of these procedural safeguards are afforded to an applicant who is faced with an assertion of public use based solely on the assertions of a patent examiner. Appellant has no authority during ex parte examination to, e.g., cross examine the Examiner or compel the Examiner to clarify his assertions.

Not Based on Examiner's Expertise in the Art

The events asserted occurred before the Examiner accumulated the experience in searching and analyzing the prior art. This experience is the basis for the presumption of administrative expertise of Patent Examiners. Interconnect Planning Corp. v. Feil, 774 F.2d 1132, 1139, 227 USPQ 543, 548, (Fed. Cir. 1985). Thus, the memories and assessments of an allegedly similar prior art system were made by one without the expertise accumulated in the role of a Patent Examiner.

Such Assertions Are Not Those of an Unbiased, Third Party

As discussed above, the Examiner provided the Examiner's Affidavit only after reading Appellant's disclosure. Thus, the assertions are of questionable accuracy on hindsight reconstruction based on Appellant's disclosure. Further, the Examiner cannot be said to be completely unbiased because the Examiner has at least a partial interest in the ability to provide an unchallengeable rejection based on personal knowledge alone.

Allowing Examiner Allegations of Prior Public Use Would Dramatically Change Examination

If an affidavit of an Examiner, alleging prior but currently discontinued public use of an invention, were allowed to constitute substantial evidence, ex parte examination would be dramatically altered. All examiners would have at least a partial interest in remembering facts, especially activities in their distant past, in a manner which more closely resembled the applicants' inventions, which were of course under review by those examiners and had already been studied by those examiners.

No new testimony allowed

Finally, Appellant notes in passing that, if any new affidavit is offered from this time forward to bolster the prior Examiner's Affidavit, this new assertions would, at best, serve as a new basis for rejection: facts not considered or relied upon by the Examiner in rejecting the claims. It would not be an affirmation of the rejection based on existing evidence in the record, since such new assertions were not previously in the record.

Specificity Requested

Please state in a new affidavit or declaration answers to the following questions. For each question, where appropriate, please also indicate if you do not remember, or you are not sure you completely remember:

- Whether the Examiner has been to any Radio Shack™ store or Radio Shack™ online web site at any time during or after 1997.
- Whether the Examiner has been to any store or online web site which sells any wireless communication device (including cellular telephones) at any time during or after 1997.
- Whether the Examiner has purchased any wireless communication device (including a cellular telephone) and / or any wireless communication device service plan at any time during or after 1997.
- Whether the Examiner has ever disclosed to others not employed by the U.S. Patent and Trademark Office that Applicants were fruitlessly pursuing a patent for the present subject matter, and if so, to whom.
- Whether the Examiner has ever previously misremembered any facts in executed affidavits or declarations.
- Approximately how many similar systems the Examiner has dealt with at any time during or after 1997.
- Whether the Examiner has ever misunderstood or misremembered a published reference such that the Examiner's interpretation of a series of steps in the published reference was erroneous.
- The Examiner's current age.
- The specific dates in 1991 and 1992 of the personal experience at the store in question.
- Whether the prices cited in the affidavit (\$250 for a cell phone, \$50 for a cell phone "discounted price") are actually what the Examiner recalls the prices to be, or whether they are examples not based on any actual remembered prices.
- The specific details of the service plans at the store in question, including requirements that the customer be a certain age, and what benefits were afforded such customers.
- The specific details of the service plans at the store in question, including certain demographic requirements that the customer, and what benefits were afforded such customers.
- The specific subsidies provided for specific lengths of service contracts at the store in question.
- The specific subsidies provided for specific costs of phones at the store in question.
- The specific location, or locations if more than one, of the store in question.
- The specific information that was required to be entered on the "Sprint™ application form".
- Whether offers provided to the customer were from the manufacturer, advertiser or service provider.
- The specific identifying information, such as names and contact information, of anyone that can verify the accuracy of any of the allegations in the affidavit or declaration.

Radio Shack Documentary Evidence

On page 16, the Examiner has cited two documents which reflect the web sites of Radio Shack™ and Buy.com™ on April 11, 2003 (items u and v on form PTO-892). Accordingly, these document are not prior art, though they follow a statement by the Examiner that "the prior art made of record and not relied upon is considered pertinent to applicant's disclosure."

The Examiner states that the Radio Shack™ web site, as evidenced by the cited document, "discloses that the method for selling and subsidizing cellular telephones as disclosed in the Examiner's Affidavit above is still in use by radio shack and has been updated to use personal computer systems online instead of facsimile machines and telephones."

On the contrary, the Radio Shack web site, as evidence evidenced by the cited document and as separately evidenced by the attached AFFIDAVIT OF DEAN ALDERUCCI and the documents attached thereto, **does not allow** customers to purchase cellular telephones or cellular telephone service plans through their web site.

The web site instead directs customers to visit a Radio Shack™ store. This is likely because one would need to visit a Radio Shack™ to so that a phone would only be sold with an accompanying service plan.

Official Notice

The officially-noted subject matter comprises the principal evidence upon which certain rejections are based.

From the Official Notice described, Applicants cannot properly determine the scope of the assertions, and Applicants therefore dispute the officially noted subject matter absent some documentary support. Accordingly, Applicants request a reference to describe the official noted subject matter in more detail. MPEP 2144.03. Specific instances of unsupported official notice include:

Appellants note that the scope of the matter of which the Examiner takes Official Notice is limited to the substantial evidence in the record for such matter. The references of record do not support the Examiner's broad assertions as to what was well known. At best, the prior art of record shows that only a very limited form of the asserted matter was known.

Accordingly, the Examiner's sweeping assertions which are not supported by the references of record lack substantial evidence, and therefore cannot be used as prior art to the present application. Only the content of the references of record which are prior art to the present application may so used. "[D]eficiencies of the cited references cannot be remedied by the Board's general conclusions about what is 'basic knowledge' or 'common sense.'" In re Zurko, 258 F.3d 1379, 1385, 59 USPQ2d 1693, 1697 (Fed. Cir. 2001); In re Lee, 277 F.3d 1338, 1344, 61 USPQ2d 1430, 1434 (Fed. Cir. 2002).

Further, too the extent such extra-record assertions might be deemed official notice, officially-noted subject matter cannot be used as the basis for a rejection under 102 or 103. Official Notice may be used, if at all, only to clarify the meaning of a reference. See, e.g., In re Ahlert, 424 F.2d

1088 (C.C.P.A. 1969) ("Typically, it is found necessary to take notice of facts which may be used to supplement or clarify the teaching of a reference disclosure, perhaps to justify or explain a particular inference to be drawn from the reference teaching.") (emphasis added).

In other words, official notice of what existed in the prior art is not permitted. A reference must be provided to show the scope and content of the prior art. See, e.g., In re Ahlert, 424 F.2d 1088 (C.C.P.A. 1969) ("Assertions of technical facts in areas of esoteric technology must always be supported by citation to some reference work recognized as standard in the pertinent art and the appellant given, in the Patent Office, the opportunity to challenge the correctness of the assertion or the notoriety or repute of the cited reference. ... Allegations concerning specific 'knowledge' of the prior art, which might be peculiar to a particular art should also be supported and the appellant similarly given the opportunity to make a challenge.") (emphasis added); In re Eynde, 480 F.2d 1364 (C.C.P.A. 1973) ("[W]e reject the notion that judicial or administrative notice may be taken of the state of the art. Facts constituting the state of the art in a patent case are normally subject to the possibility of rational disagreement among reasonable men, and are not amenable to the taking of judicial or administrative notice.") (emphasis added); In re Pardo, 684 F.2d 912 (C.C.P.A. 1982) ("[T]his court will always construe [the rule permitting judicial notice] narrowly and will regard facts found in such manner with an eye toward narrowing the scope of any conclusions to be drawn therefrom. Assertions of technical facts in areas of esoteric technology must always be supported by citation to some reference work recognized as standard in the pertinent art and the appellant given, in the Patent Office, the opportunity to challenge the correctness of the assertion or the notoriety or repute of the cited reference.") (emphasis added)

Applicants note that the following instances of Official Notice do not even purport to be supported by any evidence in the record.

Page 4:

"it is old and well known within the retail arts for merchants to conduct business and sell a myriad of products, to include cellular telephones, on the Internet through web sites."

Note that despite the purported obviousness of the proposed combination, Radio Shack™ does not allow customers to purchase cellular telephones or cellular telephone service plans through their web site - the web site directs customers to visit a Radio Shack™ store. (Please see the enclosed AFFIDAVIT OF DEAN ALDERUCCI and the documents attached thereto.) This is likely because one would need to visit a Radio Shack™ to so that a phone would only be sold with an accompanying service plan.

Page 7:

"it is old and well known within the retail arts for customers to make purchases using credit cards."

Note that nothing thus far suggests selling an item to the customer for an amount that is based on a difference between the total price and the amount of payment charged to the credit card issuer.

Page 11:

"These offers [for a discount based in the customer's application for a credit card] are not only made at a merchant's point of sale, but are prevalent throughout our 'plastic' society. Indeed, with the advent of "sponsored" credit cards several years ago, such as banks and even gasoline companies issuing VISA cards, surveys have shown that each American receives dozens of such offers each year. Indeed, Radio Shack even offered its own brand of credit card and included a percentage discount on your first purchase with it."

Claim 5 and 45:

Logan generally discloses a system where a subscriber may pay for personalized content (e.g., sound files). The subscriber may also pre-arrange to have advertising presented in exchange for receiving credit. Combining Logan with Myhre would involve, at best, presenting advertisements from different advertisers to customers.

Claim 6

Contrary to the Examiner's assertion, there is nothing in the Myhre document which states or suggests that an offer is in any way based on customer information. In fact, there is nothing that suggests that an offer is anything other than a predetermined "list of service plans offered by Sprint™", and accordingly offers are not subject to variation, much less based on customer information.

Claim 15 and 16:

The Examiner's assertions with respect to claims 15 and 16 contradict the allegations in the Myhre document. The "offer" is the "list of service plans", and if the customer information is "completing the Sprint service application form" as alleged with respect to claim 7, then such an offer is clearly provided before the customer information is received.

Claim 42:

Nothing in the Myhre document suggests that an offer is performed only if a predetermined rule (e.g., customer indicates willingness to purchase cell phone) is satisfied (i.e. and not other times).

Claims 10 and 14:

The Examiner acknowledges that the alleged personal experiences do not read on claim 10. The Examiner fails to explain why the purportedly obvious benefit of verifying information was not performed during the alleged activities, since without such verifying "it may be impossible for Sprint to complete a credit check and issue an approval".

Claims 11 - 13:

Nothing in the Myhre document or Baker patent suggests assessing a penalty against the customer, much less the specific penalties of canceling the benefit or charging a penalty fee to the customer.

Claims 56 - 60 and 63:

Nothing in Myhre or Ellis suggests such an offer for a reduction in the total price [of at least one item that a customer is ready to purchase from a merchant via a web site] in exchange for applying for a credit card account with a credit card issuer. The prior art of record only discloses that credit card issuers provide application forms in the hopes that new customers will apply.

Claim 61:

Nothing in the Myhre document suggests that customer information is received and transmitted before an offer for a subsidy is provided. Myhre in fact contradicts this.

Claims 3, 4, 17 and 33 - 40:

Nothing in the Myhre document or Saxe patent suggest, for a customer who is to purchase from a first merchant via a web site, receiving customer information which includes a service that is provided to the customer, or a service provider that provides a service to the customer.

Similarly, nothing in the Myhre document or Saxe patent suggest, for a customer who is to purchase from a first merchant via a web site, receiving customer information from a party other than the customer.

Similarly, nothing in the Myhre document or Saxe patent suggest, for a customer who is to purchase from a first merchant via a web site, determining a service provider that provides a service to the customer.

No Motivation to Combine

The record contains no motivation to combine Myhre and Logan in the manners proposed by the Examiner, absent hindsight.

Non-analogous

Further, the Myhre, Logan, Ellis and Saxe documents are directed to different fields of endeavor.

To rely on a reference under 35 U.S.C. § 103, it must be analogous prior art. The examiner must determine what is "analogous prior art" for the purpose of analyzing the obviousness of the subject matter at issue. "In order to rely on a reference as a basis for rejection of an applicant's invention, the reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the inventor was concerned." In re Oetiker, 977 F.2d 1443, 1446, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992). See also In re Deminski, 796 F.2d 436, 230 USPQ 313 (Fed. Cir. 1986); In re Clay, 966 F.2d 656, 659, 23 USPQ2d 1058, 1060-61 (Fed. Cir. 1992) ("A reference is reasonably pertinent if, even though it may be in a different field from that of the inventor's endeavor, it is one which, because of the matter with which it deals, logically would have commended itself to an inventor's attention in considering his problem.").

Conclusion

For the foregoing reasons it is submitted that all of the claims are now in condition for allowance and the Examiner's early re-examination and reconsideration are respectfully requested.

Alternatively, if there remains any question regarding the present application or any of the cited references, or if the Examiner has any further suggestions for expediting allowance of the present application, the Examiner is cordially requested to contact Dean Alderucci at telephone number 203-461-7337 or via electronic mail at Alderucci@WalkerDigital.com.

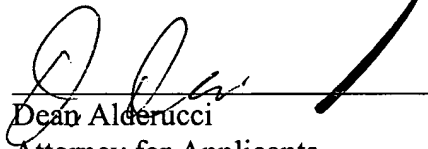
Petition for Extension of Time to Respond

Applicants hereby petition for a **three-month** extension of time with which to respond to the Office Action. Please charge \$475.00 for this petition to our Deposit Account No. 50-0271. Please charge any additional fees that may be required for this Response, or credit any overpayment to Deposit Account No. 50-0271.

If an extension of time is required, or if an additional extension of time is required in addition to that requested in a petition for an extension of time, please grant a petition for that extension of time which is required to make this Response timely, and please charge any fee for such extension to Deposit Account No. 50-0271.

Respectfully submitted,

October 22, 2003
Date



Dean Alderucci
Attorney for Applicants
Registration No. 40,484
Alderucci@WalkerDigital.com
203-461-7337 / voice
203-461-7300 / fax

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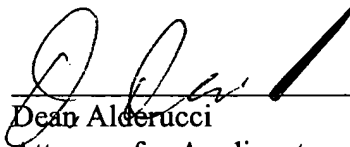
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Respectfully submitted,

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Dean Alderucci
Attorney for Applicants
Registration No. 40,484
Alderucci@WalkerDigital.com
203-461-7337 / voice
203-461-7300 / fax